YONG SZE HONG

v.

PAN KA GENERAL AGENCIES SDN. BHD.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[SUIT NO. KG. 189 OF 1990]
18 SEPTEMBER 1993

PRACTICE AND PROCEDURE: Summary application to strike out claim - Rules of the High Court, 1980 Ord. 18 r. 19(1)(a) - Principles to be applied - Whether pleading disclosed reasonable cause of action.

WORDS AND PHRASES: "Cause of action".

This was an application by the defendant under Order 18 r. 19 (1)(a), Rules of the High Court, 1980 to summarily strike out the plaintiff's claim. In his statement of claim the plaintiff averred that he was the sole sub-marketing agent for the sale of Sarawak Turf Club's combined Sweepstakes and Instant Scratch Tickets for the respective districts of Kuching, Kota Samarahan and Sri Aman with exclusive right to sell the said tickets in those districts. The plaintiff alleged that the defendant had unlawfully infringed his exclusive right when the latter started selling the same tickets in the same districts thereby causing the plaintiff loss and damage.

The defendant argued that the statement of claim disclosed no cause of action known to law. It was further submitted that the pleading did not make clear whether the claim was based on tort or on contract and that the plaintiff could not sue the defendant on contract since the defendant was not a party to the agreement which appointed the plaintiff the districts' sole sub-agent for the sale of the said tickets.

Held:

[1] The mere fact that the case of the plaintiff is weak or may not be likely to succeed at the trial is no ground for striking out the pleading as disclosing no reasonable cause of action. For the purpose of the present application, all that needs be shown by the plaintiff is not that there is a good cause of action but that there exists a reasonable or arguable cause of action. It is sufficient if some cause of action, however weak, or some question fit to be decided by the Court, is disclosed.

[2] To determine whether a statement of claim shows any cause of action or not the Court will look at the substance of the action and not merely at the form of the pleadings. In the instant case what the plaintiff in fact averred was infringement of his exclusive contractual rights. It is settled law that there are recognised exceptions to the doctrine of privity of contract. A claim against a non-contractual party for wrongful interference with contractual rights of the contracting parties, is a claim in tort falling within the exception.

[3] Although the plaintiff's statement of claim could be more clearly and better pleaded it does not warrant the drastic fate of being struck out on the ground as advanced by the defendant.

[Application dismissed].

Cases referred to:

Read v. Brown [1988] 22 QBD 128 ***(refd)***
Letang v. Cooper [1965] 1 QB 232 CA ***(foll)***
Drummond-Jackson v. British Medical Association & Ors. [1970] 1 WLR 688 CA ***(cit)***
Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor. [1967] 1 MLJ 87 ***(foll)***
New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd. [1985] 1 MLJ 226 ***(foll)***
Hambro Life Assurance plc. v. White Young & Partners [1985] 275 ***(refd)***
Hirsch v. Somervell [1946] 2 AER 430 CA ***(cit)***
Netz v. Chuter Ede [1946] 1 Ch. 224 ***(cit)***
Jarvis v. Moy, Davies, Smith, Vandervell & Co. [1936] 1 KB 339 ***(foll)***
Gautret v. Egerton [1867] LR CP 371 ***(cit)***
West Rand Central Gold Mining Co. v. R [1905] 2 KB 391 ***(cit)***
British Motor Trade Association v. Salvadori & Ors. [1949] Ch. 556 ***(cit)***
Torquay Hotel Co. Ltd. v. Cousins [1969] 2 Ch. 106 ***(cit)***
Merkur Island Shipping Corpn. v. Laughton [1983] 2 AER 189 ***(cit)***
Dimbleby & Sons Ltd. v. National Union of Journalists [1984] 1 WLR 117 ***(cit)***
Midland Rollmakers Ltd. & Ors. v. Collins & Ors., The Times, 18 June 1981 ***(refd)***
Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor. [1984] 2 MLJ 105 FC ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(1)(a), (2)
Rules of the Supreme Court 1957, O. 18 r. 19, O. 25 r. 4

For the plaintiff - Francis Wee; M/s. Si & Wee
For the defendant - Y.Y. Sim; M/s. Tang, Teng & Partners

JUDGMENT

Chong Siew Fai J:

The defendant applies under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 to strike out the plaintiff's action alleging that the statement of claim discloses no reasonable cause of action.

What is a cause of action?

In *Read v. Brown* [1988] 22 QBD 128 Lord Esher MR defined the phrase as comprising every fact, though not every piece of evidence, which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court.

The case of *Letang v. Cooper* [1965] 1 QB 232 CA, is, for our purpose, more illustrative. That was an action on negligence and/or trespass. There Diplock LJ said (p. 242):

> A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

He then gave an interesting account of the historical and terminological connections between forms of action and causes of actions, and continued (p. 244):

> The factual situation upon which the plaintiff's action was found is set out in the statement of claim.

After describing the acts of the defendant giving rise to the action for claim of damages, Lord Diplock continued:

> That factual situation was the plaintiff's cause of action. It was the cause of action for which the plaintiff claims damages in respect of the personal injuries which she sustained.

Still later, he said (p. 245C):

> I am therefore of opinion that the facts pleaded in the present action make it an action "for negligence ... where the damages claimed by the plaintiff for the negligence ... consist of or include damages in respect of personal injuries to" the plaintiff, ...

Thus, whether or not there is a cause of action in a case, one has to look at the matters pleaded in the statement of claim.

Reasonable cause of action

What constitutes a reasonable cause of action? It is one with some chance of success where (as required by paragraph (2) of r. 19) only the allegations in the pleading are considered. *Drummond-Jackson v. British Medical Association & Ors.* [1970] 1 WLR 688 CA @ 696 C-D.

I would now attempt to state briefly the principles involved in an application to strike out action on the ground that the pleading discloses no reasonable cause of action.

1. On an application under this ground, no evidence including affidavit evidence is admissible. O. 18 r. 19(2).
2. Recourse to this summarily striking out procedure should be had only in plain and obvious cases where the position is clearly beyond doubt, or where cause of action is on the face of it obviously unsustainable or where the case is unarguable.
3. If a statement of claim complained of discloses some cause of action or some question fit to be tried, whether it be a question of law or fact or mixed law and fact, the mere fact that the case is weak or may not be likely to succeed at the trial is no ground for striking out the pleading as disclosing no reasonable cause of action.
4. Since only the pleadings are to be examined, the court has to assume that the facts as pleaded are true and undisputed. It must be emphasized, however, that this can only be an assumption for the purpose of the application.

A concise statement of the law incorporating the above principles may be found in *Mooney & Ors. v. Peat, Marwick, Mitchell & Co. & Anor.* [1967] 1 MLJ 87 - a case under O. 25 r. 4 of the Rules of the Supreme Court 1957 (repealed) the equivalent of which in our present 1980 Rules is O. 18 r. 19(1)(a) - where Raja Azlan Shah J. (as His Majesty then was) said (p. 88):

> It is firmly established that the power exercisable under r. 4 "is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": see the judgment of Lindley MR in *Hubbuck & Sons v. Wilkinson, Heywood & Clark Ltd.* [1899] 1 QB 86, 91. Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any statable case can be made for this application: see *Peck v. Russell* [1923] 4 FMS LR 32, 34. The court cannot and indeed is not

empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler v. Holder* [1886] 54 LT 298. A recent exposition of the law is afforded by the judgment of Danckwerts LJ in *Wenlock v. Moloney* [1965] 1 WLR 1238, 1243.

> Under the rule (i.e. 0. 25 r. 4) it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed ... But, as the procedure was of a summary nature the party was not to be deprived of his right to have his case tried by a proper trial unless the matter was clear.

After stating that the former rules are now incorporated in the revised Rules of the Supreme Court 0. 18 r. 19, he continues:

> But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge.

In *New Straits Times (M) Bhd. v. Kumpulan Kertas Niaga Sdn. Bhd.* [1985] 1 MLJ 226 FC Mohamed Azmi FJ, after a review of some authorities stated (p. 227):

> It is therefore clear law that in an application to strike out pleadings under O. 18 r. 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the statement of defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable. (See AG of the Duchy of Lancaster v. L and NW Ry. Co. [1892] 3 Ch. 274).

In *Hambro Life Assurance Plc. v. White Young & Partners* [1985] 275 Estates Gazette 1127 CA, a claim in negligence action was not struck out where an examination might reveal a successful cause of action.

An arguable claim will not be struck out (*Hirsch v. Somervell* [1946] 2 AER 430 CA) unless it cannot possibly succeed (*Netz v. Chuter Ede* [1946] 1 Ch. 224).

Having stated the above principles I shall now consider the application of the defendant in the present case.

The statement of claim of the plaintiff is simple. Briefly, his case is that under a letter of appointment dated 16 January 1989, he was the sub-marketing agent for the sale of the Sarawak Turf Club's combined Sweepstakes and Instant Scratch Tickets of Tropic Fair Sdn. Bhd. (the principal) for the territories of Bahagian Kuching, Kota Samarahan and Sri Aman; and that under the terms of the appointment as such agent "he was to have sole and exclusive right of sale in the Districts of Kuching, Sri Aman and Kota Samarahan" (Paragraphs 1 and 3 of the statement of claim). He contends that the defendant infringed his exclusive right by selling and, despite warning persistently selling such tickets in the said territories, more particularly, in the Kuching District or area, thereby causing loss and damage to the plaintiff (Paragraphs 4, 5 and 6 of the statement of claim). He accordingly claims damages against the defendant. As stated earlier, for the purpose of the present application, it has to be assumed that the allegations of the plaintiff are true and undisputed.

For the defendant it was argued that there was no cause of action known to law. Counsel submitted that it was not clear from the pleading whether the action was founded on contract or tort, and that the plaintiff could not sue the defendant on contract since the defendant was not a party to the letter of appointment dated 16 January 1989.

In reply, Counsel for the plaintiff submitted that the action was grounded not on contract but on tort of negligence or, in any event, on tort based on the defendant's infringements of the plaintiff's exclusive rights.

There is some merit in the argument that the averments in the statement of claim do not clearly show whether the action is founded on contract or tort. However, to determine the point, the form of the action as stated in the pleading is immaterial; what has to be looked at is the substance of the action. As stated by Greer LJ in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* [1936] 1 KB 339 at 404:

> ... I cannot ... escape the conclusion that we must look not merely at the form of the pleadings but at the substance of the matter. ...

It is beyond dispute that there can be no cause of action on contract since the defendant was not a party to the said letter of appointment. Furthermore, if Counsel had solely relied on the tort of negligence, I would also have grave doubt if the action as pleaded could be sustained. It is elementary that the essential elements of actionable negligence are:

1. the existence of a duty to take care owing to the plaintiff by the defendant;
2. failure to attain that standard of care prescribed by the law; and
3. damage suffered by the plaintiff, which is causally connected with the breach of duty to take care.

The statement of claim should state the facts, upon which the supposed duty is founded, the duty to the plaintiff and the breach of such duty with which the defendant is charged. See *Gautret v. Egerton* [1867] LR 2 CP 371 approved by Lord Alverstone CJ in *West Rand Central Gold Mining Co. v. R.* [1905] 2 KB 391 @ 400. The pleading should also show by way of particulars or otherwise in what respects the defendant was negligent. None of the above features appears in the statement of claim in the present action.

However, that does not conclude the matter. The plaintiff avers infringements of his exclusive contractual rights. It is settled law that there are recognised exceptions to the doctrine of privity of contract. A claim against a non-contractual party for knowingly wrongful interference with contractual rights of the contracting parties is a claim in tort falling within the exception. See e.g. *British Motor Trade Association v. Salvadori & Ors.* [1949] Ch. 556. There is the tort of deliberate and direct interference with the performance of a contract without any requirement for a breach to be procured. *Torquay Hotel Co. Ltd. v. Cousins* [1969] 2 Ch. 106 @ 138 CA (per Lord Denning MR); *Merkur Island Shipping Corpn. v. Laughton* [1983] 2 AER 189 @ 195 HL (per Lord Diplock); *Dimbleby & Sons Ltd. v. National Union of Journalists* [1984] 1 WLR 117 @ 126 CA (per Donaldson MR). The interference includes any hindrance upon the freedom of either party to perform a contract.

In *Midland Rollmakers Ltd. & Ors. v. Collins & Ors.*, The Times, 18 June 1981, the actions were against some 23 defendants amongst whom was a bank against which the claims were, *inter alia*, for assisting in the procurement of a breach of contract and unlawfully interfering with the plaintiff's business. On an application by the bank for striking out the statement of claim as disclosing no reasonable cause of action, contending that the activity it had involved in was merely an ordinary banking transaction, the court refused to strike out the pleading.

The statement of claim in our instant case could have been more clearly and better pleaded but I do not think it warrants the drastic fate of being struck out on the ground as advanced. All that needs be shown, for the purpose of the instant application, is not that there is a good cause of action but that there exists a **reasonable** i.e. arguable cause of action. It is sufficient if some cause of action, however weak, or some question fit to be decided by the court is disclosed. The action may not be likely to succeed but that is a different matter. See *Loh Holdings Sdn. Bhd. v. Peglin Development Sdn. Bhd. & Anor.* [1984] 2 MLJ 105 FC (incidentally also a case on, *inter alia*, inducement of breach of contract). In my opinion the contention of the defendant fails and the discretion to strike out the statement of claim ought not be exercised.

The application is dismissed with costs to the plaintiff.